Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CLARK R. INGRAM, GEORGE M. INGRAM,
GARY C. INGRAM and GREGORY B. INGRAM,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourteenth Amendment right to due process of law is violated when a state agency holds a former surface mine operator liable for a pre-existing water quality problem at a mining site without showing that the operator caused the problem and where the operator had relied upon a prior state regulation which was in existence while all of his mining operations were conducted and completed and which made his operations lawful?

PARTIES TO THE PROCEEDING

In addition to petitioners Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram and respondent Commonwealth of Pennsylvania, Department of Environmental Resources, the parties to the proceeding before the Supreme Court of Pennsylvania were Henry L. Israel and Betty Ann Taylor, Personal Representatives of the Estate of Herman J. Israel, and Rockwood Energy and Mineral Corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners CLARK R. INGRAM, GEORGE M. INGRAM, GARY C. INGRAM and GREGORY B. INGRAM, by their attorneys, MacDonald, Illig, Jones & Britton, respectfully

request that a writ of certiorari issue to review the Order of the Supreme Court of Pennsylvania, entered May 19, 1992, denying the Petition for Allowance of Appeal on Behalf of Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram.

OPINIONS BELOW

There is no Opinion below of the Supreme Court of Pennsylvania in *Clark R. Ingram, et. al. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, No. 441 W.D. Allocatur Docket, 1991, with respect to the Order entered May 19, 1992, denying the Petition for Allowance of Appeal on Behalf of Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram. Entry of this Order is reported at 605 A.2d 257 (1992).

The Opinion below of the Commonwealth Court of Pennsylvania in *Clark R. Ingram, et. al. v. Department of Environmental Resources*, No. 1075 C.D. 1990, is reported at 141 Pa. Commw. Ct. 324, 595 A.2d 733 (1991).

The Opinion below of the Pennsylvania Environmental Hearing Board in *Ingram Coal Co., et. al. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 88-291-F (Consolidated Cases), is reported at 1990 EHB 395.

BASIS FOR JURISDICTION

The Order of the Supreme Court of Pennsylvania, denying the Petition for Allowance of Appeal on Behalf of Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram, was entered on May 19, 1992.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The federal constitutional provision involved is the United States Constitution, Amendment XIV, Section 1 which is set forth in Appendix D at page A-66.

The state statutory provision involved is Section 315(a) of the Pennsylvania Clean Streams Law, 35 P.S. § 691.315(a), which is set forth in Appendix E at pages A-67 to A-68.

The state regulatory provisions involved are Section 77.92(26) of the Regulations of the Pennsylvania Environmental Quality Board, 25 Pa. Code § 77.92(26), later renumbered and codified as Section 77.92(d)(8) of the Regulations of the Pennsylvania Environmental Quality

Board, 25 Pa. Code § 77.92(d) [rescinded, effective July 31, 1982, 12 Pa. Bull. 2382 (July 31, 1982)] and Section 87.102(a)(1), (2), (5) of the Regulations of the Pennsylvania Environmental Quality Board, 25 Pa. Code § 87.102(a)(1)(2) and (5), all of which are set forth in Appendix F at pages A-72 to A-76.

STATEMENT OF THE CASE

Summary of Facts. This case concerns a Compliance Order issued by respondent Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter "DER") against petitioners Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram (hereinafter "Ingrams") and others[1] on August 30, 1988, directing

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[1] The other parties against which the Compliance Order was issued were Rockwood Energy and Minerals Corporation, d/b/a Ingram Coal Company, (hereinafter "Remcorp") and Herman J.

that certain remedial action be taken for alleged violations of water quality standards at a coal surface mining site in Clarion County, Pennsylvania. DER issued the Compliance Order without any determination that Ingrams caused the water quality problems at the mining site and despite the fact that while Ingrams operated the site, the Pennsylvania Environmental Quality Board Regulations provided that a surface coal mine operator would not be held responsible for pre-existing water quality problems at a site.

Ingrams formed a surface mining business, known as "Ingram Coal Company," which was a partnership consisting of Clark R. Ingram and his sons, George M.

Israel, a/k/a H. J. Israel (hereinafter "Israel"). Israel died during the course of proceedings before the Pennsylvania Environmental Hearing Board (hereinafter "EHB"), and Henry L. Israel and Betty Ann Taylor, Personal Representatives of the Estate of Herman J. Israel (hereinafter "Estate of Israel"), were substituted as parties.

Ingram, Gary C. Ingram and Gregory B. Ingram. In 1976, Ingrams applied to DER for a Mine Drainage Permit and a Mining Permit in order to surface mine a certain job at the Frenchville Site. Prior to the time that Ingrams commenced strip mining of coal at the Frenchville Site in late 1976, there were pre-existing springs or discharges in the area of the "southern toe of spoil." There also was evidence of earlier mining activity near the "southern toe of spoil."

During the course of the application procedure, DER and the Pennsylvania Fish Commission investigated the Frenchville Site and the surrounding area. This investigation and the pre-mining reports revealed that the water quality at the Site, including the area known as the "southern toe of spoil," did not meet DER standards prior to any mining by Ingrams. The investigation and pre-mining reports

further revealed that Deer Creek, into which drainage from the Site flowed, was an acid stream with no aquatic life present prior to any mining by Ingrams and was not used for water supplies, bathing, fishing, recreation or industrial uses. With this actual knowledge that the pre-existing water quality at the Frenchville Site did not meet DER standards, DER issued the Permits to Ingrams in accordance with existing state regulations.

During the period from 1976 to July 31, 1982, DER operated under Regulations of the Pennsylvania Environmental Quality Board, pursuant to which a surface coal mine operator such as Ingrams would not be held responsible for pre-existing water quality problems at a site unless his own mining operations made the discharge worse, either in quality or quantity. These Regulations were codified at 25 Pa. Code § 77.92(26) as of 1972 and

at 25 Pa. Code § 77.92(d)(8) as of 1982 and were communicated to Ingrams and other surface coal mine operators who relied upon the Regulations in applying for mining permits and in conducting their mining operations, including mining at the Frenchville Site.

After surface mining began at the Frenchville Site in late 1976, DER conducted numerous inspections of the mining activities, including several examinations of the water quality at the Site. At no time during the period from 1976 until the issuance of the DER Compliance Order in 1988, did DER issue any citation or other notice of violation to Ingrams, or to any other party, regarding the water quality at the Frenchville Site. To the contrary, DER recognized on several occasions that the water quality at the Site was not in violation because of its pre-existing condition before any mining

activity by Ingrams. For example, in Inspection Reports dated April 1, 1982, May 11, 1982, and May 18, 20, 1982, a DER Inspector made express reference to "southern toe of spoil" seeps which were "pre-existing."

As of May 28, 1982, there was no active mining on the Frenchville Site. Ingrams had filed a Completion Report and Amended Completion Report with DER in 1981, and reclamation of the Site was underway, including backfilling and replanting. On May 28, 1982, Ingrams sold their entire surface mining business -- Ingram Coal Company -- to Israel and Remcorp and ceased all involvement in the strip mining of coal. At that time, there were no outstanding DER violations with respect to the water quality at the Frenchville Site. All reclamation or other DER-related activities at the Frenchville Site from May 28, 1982, to the present were performed

by Israel and/or Remcorp, and not by Ingrams.

According to engineering testimony, surface mining activity by Ingrams prior to May 28, 1982, did not make the pre-existing water quality at the Frenchville Site worse, either in quality or quantity. DER admitted that the sole basis for issuance of the DER Compliance Order in 1988 was the then current Regulation of the Pennsylvania Environmental Quality Board at 25 Pa. Code § 87.102 which did not require a finding of causation and that DER did not give any consideration to pre-existing water quality at the Frenchville Site.

If DER had advised Ingrams at the time that Ingrams applied for the Mine Drainage Permit or the Mining Permit that DER would hold Ingrams responsible to correct the pre-existing water quality problems at the Site, regardless of any effect that their own mining had at the Site, Ingrams would

not have conducted any mining operations at the Site.

The Proceedings Below. The proceedings against Ingrams commenced on August 30, 1988 with the reissuance by DER of Compliance Order No. 88H057, as amended and restated, against Remcorp, Israel and Ingrams, alleging that certain discharges violated water quality standards set forth at 25 Pa. Code § 87.102(a)(1), (2) and (5) and directing that adequate treatment be implemented.[2]

Ingrams, along with Remcorp and Israel, filed appeals to the EHB, challenging the validity of the Compliance Order. As part of those appeal proceedings, Ingrams and DER each filed motions for summary judgment, supported by

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[2] DER initially issued Compliance Order No. 88H057 on June 29, 1988 against only Remcorp. Remcorp was the owner of Ingram Coal Company when the Compliance Order issued.

the record of a supersedeas hearing as well as by other supplemental filings. On April 17, 1990, prior to any final hearing on the merits, the EHB entered an Opinion and Order Sur Motion for Partial Summary Judgment, Cross-Motions for Summary Judgment and Motion to Dismiss which, in part, granted summary judgment in favor of DER against Ingrams and dismissed the appeal filed by Ingrams.[3] On April 27, 1990, the EHB amended the April 17, 1990 Order to correct typographical errors.

On May 17, 1990, Ingrams filed a Petition for Review with the Commonwealth Court of Pennsylvania, seeking a review of the EHB Order entered April 17, 1990.[4] By

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[3] The Order entered April 17, 1990 by the EHB also granted summary judgment in favor of DER against the Estate of Israel and dismissed the appeal filed by Israel.

[4] Estate of Israel also filed a Petition for Review with the Commonwealth Court of Pennsylvania which was consolidated with that of Ingrams. Remcorp intervened as a party to both appeals.

Opinion and Order entered July 19, 1991, the Commonwealth Court affirmed the EHB Order.

On August 19, 1991, Ingrams filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, seeking discretionary review of the Order of the Commonwealth Court of Pennsylvania entered on July 19, 1991.[5] By Order entered May 19, 1992, the Supreme Court of Pennsylvania denied Ingrams' Petition for Allowance of Appeal.

Raising of the Federal Question. In the proceedings before the EHB, Ingrams raised a federal constitutional question, based upon the United States Constitution, Amendment XIV, Section 1, in their

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[5] Estate of Israel filed a Cross-Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. This Cross-Petition also was denied by Order of the Supreme Court of Pennsylvania entered May 19, 1992.

Objections to DER Motion for Partial Summary Judgment or in the Alternative to Limit Issues and Cross-Motion for Summary Judgment on Behalf of Appellants Clark R. Ingram, Gary C. Ingram, George M. Ingram and Gregory B. Ingram and in their Brief in Support of Opposition to the DER Motion for Partial Summary Judgment or in the Alternative to Limit Issues and Cross-Motion for Summary Judgment on Behalf of Appellants Clark R. Ingram, Gary C. Ingram, George M. Ingram, excerpts of which are set forth in Appendix I at pages A-123 to A-135. The EHB considered, discussed and rejected Ingrams' constitutional argument in its Opinion and Order Sur Motion for Partial Summary Judgment, Cross-Motions for Summary Judgment and Motion to Dismiss entered April 17, 1990, which is set forth in Appendix C at pages A-29 to A-65.

In the proceedings before the Commonwealth Court of Pennsylvania, Ingrams

raised the federal constitutional question in their Brief for Petitioners Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram at No. 1075 and in their Reply Brief for Petitioners Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram at No. 1075 C.D. 1990, excerpts of which are set forth in Appendix H at pages A-94 to A-122. The Commonwealth Court of Pennsylvania considered, discussed and rejected Ingrams' constitutional argument in its Opinion and Order entered July 19, 1991, which is set forth in Appendix B at pages A-2 to A-28.

In the proceedings before the Supreme Court of Pennsylvania, Ingrams raised the federal constitutional question in their Petition for Allowance of Appeal on Behalf of Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram, excerpts of which are set forth in Appendix G at pages A-77 to A-93. The Supreme Court

of Pennsylvania considered the Petition for Allowance of Appeal, but declined to consider Ingrams' constitutional argument on the merits by its Order entered May 19, 1992, denying the Petition seeking discretionary review which is set forth in Appendix A at page A-1.

REASONS FOR GRANTING THE WRIT

This case presents important constitutional questions regarding a State's right to hold a person liable for conduct which was entirely legal and proper at the time it was performed, but became illegal only after the conduct had ceased. The Commonwealth Court of Pennsylvania held that Ingrams' constitutional right to due process of law was not violated when state officials affirmatively advised Ingrams that their conduct was legal, changed the law after the Ingrams' conduct had ceased,

and subsequently, held Ingrams liable because their past conduct now was deemed illegal. The Supreme Court of Pennsylvania then refused to exercise its discretion to review the Commonwealth Court decision. These Pennsylvania court decisions conflict with several decisions of this Court and seriously misconstrue the protections of due process of law under Amendment XIV, Section 1 of the United States Constitution.

1. The Commonwealth Court of Pennsylvania's decision upholding the constitutionality of the DER's application of new regulations to prior conduct conflicts with this Court's decisions in *Raley v. Ohio*, 360 U.S. 423 (1959), *Cox v. Louisiana*, 379 U.S. 559 (1965), and *Marks v. United States*, 430 U.S. 188 (1977).

The Commonwealth Court of Pennsylvania, in concluding that DER's application of new state regulations to

prior conduct was not a violation of Ingrams right to due process of law, failed to follow this Court's decisions in *Raley*, *Cox* and *Marks*. In all three of these cases, the Court held that the Due Process Clause of the Fifth or Fourteenth Amendments provides protection to defendants who act in accord with state law or regulations, and who then are prosecuted for those actions at a later time under new, stricter laws or regulations. These decisions are fully applicable to the present case, but were ignored by the Commonwealth Court of Pennsylvania and subsequently by the Supreme Court of Pennsylvania, thus allowing the Commonwealth of Pennsylvania to deprive Ingrams of their constitutional right to due process.

In both *Raley* and *Cox*, a government official had assured a defendant that certain conduct was legal, and the

defendant reasonably relied upon that advice and continued or initiated the conduct. Subsequently, the defendant was convicted for doing the very act which he had been advised was legal. This Court held that such a conviction is not permitted by the Due Process Clause, reasoning that to uphold the convictions:

> ". . . would be to sanction an indefensible sort of entrapment by the State - convicting a citizen for exercising a privilege which the State had clearly told him was available to him."

Raley, 360 U.S. at 426; *Cox*, 379 U.S. at 571.

In *Marks*, this Court held that the Due Process Clause precluded application of a newer, stricter obscenity standard, which had been announced by the Court after the defendants had performed the conduct with which they were charged, to the defendants because they did not have "fair warning" that their conduct was illegal. *Marks*, 430

U.S. at 195-196. See also *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Rabe v. Washington*, 405 U.S. 313 (1972). The *Marks* line of cases recognizes another element of a defendant's right to due process, similar to, but slightly broader than the "entrapment" principle of *Raley* and *Cox*, i.e. a defendant cannot be held liable for violation of a law when he had no fair warning or notice that his conduct was illegal.[6]

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[6] *Raley*, *Cox* and *Marks* were all criminal cases, but the due process principles enunciated therein have been applied in civil suits by the lower federal courts. See, e.g., *International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Brock*, 783 F.2d 237, 248 (D.C. Cir. 1986); *Morrison v. U.S. Dept. of Labor*, 713 F. Supp. 664, 675 (S.D. N.Y. 1989); *Kratz v. Kratz*, 477 F. Supp. 463, 483 (E.D. Pa. 1979). In extending application of the *Raley*, *Cox* and *Marks* decisions to a civil case, the *Kratz* court relied in part on the fact that the statute which the *Kratz* defendants were accused of violating contained criminal as well as civil penalties. *Kratz*, 477 F. Supp. at 483. In the present case, the statute under which Pennsylvania seeks to punish Ingrams. Section 315(a) of the Clean Streams Law, 35 P.S. § 691.315(a), is in large part a criminal statute, subjecting violators to imprisonment for up to two years and fines of up to $50,000.00. 35 P.S. § 691.602(c); 35 P.S. § 691.605(a).

The present case presents a compelling circumstance in which to apply the rules of *Raley*, *Cox* and *Marks*. Ingrams are accused of violating Section 315(a) of Pennsylvania's Clean Streams Law, 35 P.S. § 691.315(a), which provides, in relevant part:

> No person shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department . . .. [Emphasis added].

During the entire time the Ingrams mined the Frenchville Site, DER operated under the following state regulation:

> "The operator shall take the necessary steps to eliminate, if possible, any gravity drains from previous mining. Any drainage so encountered shall be treated to neutrality during the period of corrective action and during the life of the operation. The operator shall be responsible for any additional pollution load." [Emphasis added].

25 Pa. Code § 77.92(26)(1972), later codified at 25 Pa. Code § 77.92(d)(8)(1982).

This state regulation notified surface mine operators, such as Ingrams, that they would not be liable for discharges at a mining site unless their own mining operations added to the pollution load. The state regulation, moreover, was interpreted and applied in just this fashion by the Pennsylvania officials charged with overseeing the operation of surface mines, as established by the Affidavit of J. Anthony Ercole, the Director of DER's Bureau of Surface Mining Reclamation from 1977 to 1983, who testified:

> This Regulation of 25 Pa. Code Section 77.92 embodied the official policy and practice of the Department of Environmental Resources not to hold surface coal mine operators responsible for mine discharges existing from prior mining, after the life of the operator's mining, whether

> the discharges were on or off the operator's permit area, unless the operator made the discharge worse either in quality or quantity as a result of his own mining.

The record also is replete with affirmative actions taken by DER officials which confirmed the existing rule that Ingrams would be held liable only if their own surface mining activity increased any pollution emanating from a mining site and not for pre-existing discharges.

Finally, it is undisputed that Ingrams relied upon the state regulations and the representations and actions of DER officials in applying for mining permits and conducting mining operations, including mining at the Frenchville Site. If DER had advised Ingrams at the time that Ingrams applied for its mining permits that Ingrams would be held responsible to correct the pre-existing water quality problems at the Site, regardless of any effect that their

own mining had at the Site, Ingrams would not have conducted any such mining operations.

These facts reveal that DER violated the due process rights of Ingrams when DER issued its Compliance Order requiring the Ingrams to remediate a problem which existed before Ingrams possessed the site, which the Ingrams did not cause and which DER had affirmatively represented to Ingrams would not be a basis for liablity. Here the Ingrams were specifically advised by the responsible government authority, through statute, regulation, affirmation and action, that their conduct was entirely legal and consistent with then-applicable law. Thus, Ingrams had every reason to believe their actions were permissible. To now hold Ingrams liable for prior surface mining operations is precisely the kind of "entrapment" which the Court found unconstitutional in *Raley* and *Cox*, as well

as the sort of conviction without fair warning deemed impermissible in *Marks*.

2. The Commonwealth Court of Pennsylvania's decision that DER's application of new, stricter regulations to conduct performed prior to enactment of the new regulations conflicts with this Court's decisions regarding the constitutionality of retroactive laws.

During the entire time that Ingrams operated the Frenchville Site and until the sale of their business in May of 1982, the discharges emanating from the Frenchville Site were in total compliance with applicable state regulations. These regulations, however, were rescinded on July 31, 1982 and replaced with new, more stringent regulations. In 1988, DER issued its Compliance Order, attempting to hold Ingrams liable based upon the newer state

regulations and with no consideration as to whether Ingrams caused the discharges.

DER's action clearly is a retroactive application of the law because Ingrams have been called to account for their previously lawful conduct.[7] Retroactive legislation has not been favored by this Court:

> ". . . [R]etroactive legislation does have to meet a burden not faced by legislation that has only future effects. 'It does not follow . . . that what Congress can legislate prospectively it can legislate

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[7] The Commonwealth Court of Pennsylvania wrongly determined that the application of new state regulations to Ingrams past conduct was not a retroactive application of the regulations.

> "A rule has retroactive effect if 'an act lawful at the time it was done' is 'rendered unlawful and the actor called to account for a completed, now condemned deed in the halls of justice.' *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121, 1127 (D.C. Cir. 1985). In other words, a retroactive rule is one that alters the *past* legal consequences of past actions. *Bowen* [*v. Georgetown University Hospital*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring)].

American Mining Congress v. United States Environmental Protection Agency, 965 F.2d 759, 769 (9th Cir. 1992).

> retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.'"

Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 467 U.S. 717, 730 (1984), citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976).

The due process test which this Court has applied to retroactive legislation is that the retroactive effect of the rule must be justified by a rational legislative purpose and not be particularly arbitrary, harsh or oppressive. *Pension Benefit Guaranty Corp.*, 467 U.S. at 730, 733. The limits of due process are exceeded when the retroactive effects of the law are "so wholly unexpected and disruptive that harsh and oppressive consequences follow . . .." *Hazelwood Chronic & Convalescent Hospitals, Inc. v. Weinberger*, 543 F.2d 703, 708 (9th

Cir. 1976), vacated on other grounds, 430 U.S. 952 (1977).

In determining if the retroactivity is unreasonable, arbitrary, harsh or oppressive, the defendant's reliance on the pre-existing state of the law must be considered. *Marks v. United States*, 430 U.S. 188, 195-196 (1977); *Cox v. Louisiana*, 379 U.S. 559, 571 (1965); *Raley v. Ohio*, 360 U.S. 423, 426 (1959). See also *Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L.R. 692, 727 (1960). The justification for retroactive legislation must also take into account the possibility that the defendant acted in reliance on the law in place at the time of the subject conduct and that the defendant may have altered his conduct to reduce liability if he had reason to anticipate the future imposition of liability. See *Welch v. Henry*, 305 U.S. 134, 147 (1938).

Applying this constitutional test to the state regulations in this case leaves little doubt that Ingrams' right to due process has been violated. First, as noted above, it is undisputed that Ingrams relied to their detriment on the state statute and regulations extant at the time of their mining operations. Clark Ingram testified, without contradiction, that Ingrams relied upon the statute and regulations, as well as the representations and actions of DER officials, in applying for mining permits and conducting mining operations at the Frenchville Site. He also affirmed that if DER had advised Ingrams that they would be held responsible for the pre-existing water quality problems at the Site, regardless of any effect their own mining had on the water quality, Ingrams would not have conducted mining operations at the Site. Under *Raley*, *Cox* and *Marks*, this fact weighs heavily against the

constitutionality of retroactive application of the Clean Streams Law and its Regulations.

DER's attempt to retroactively apply the law and their regulations. DER's attempt to apply new standards to Ingrams' past conduct seeks to hold Ingrams absolutely liable for conditions on the prior mining site despite the absence of evidence that Ingrams caused any of the pollution. Imposition of strict liability without causation is a departure from traditional concepts of liability under tort law. W. P. KEETON, PROSSER AND KEETON ON TORTS § 75 (5th Ed. 1984). - Not only does the Commonwealth Court of Pennsylvania impose liability upon Ingrams without fault, as in a typical "strict liability" case, but also the Commonwealth Court goes one step further and imposes strict liability without causation. W. P. KEETON, PROSSER AND KEETON ON TORTS § 75 (5th Ed.

1984). The harsh effects of strict liability without causation are clear enough, but to impose such liability retroactively with no fair warning of such a departure from traditional legal concepts is so harsh and oppressive as to offend due process.

This Court has long recognized that the Due Process Clause was intended to protect the individual from the arbitrary exercise of the powers of government. *Hurtado v. California*, 110 U.S. 516 (1884). By permitting DER to retroactively apply Pennsylvania law and regulations, the Commonwealth Court of Pennsylvania has misinterpreted, misapplied and ignored precedents of this Court regarding Ingrams' right to due process of law under Amendment XIV, Section 1 of the United States Constitution, and the Supreme Court of Pennsylvania has failed to protect Ingrams' constitutional rights by denying their

Petition for Allowance of Appeal. Thus, this Court should grant certiorari to correct this manifest injustice.

CONCLUSION

For the reasons set forth above, petitioners Clark R. Ingram, George M. Ingram, Gary C. Ingram and Gregory B. Ingram respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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